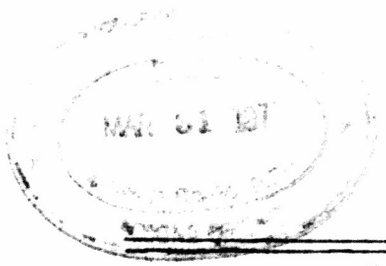
United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC



76-7430

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 617 - SEPTEMBER TERM 1976

LOCAL 771, I.A.T.S.E., AFL-CIO,

Plaintiff-Appellee-Cross-Appellant,

-v-

RKO GENERAL, INC., WOR DIVISION,

Defendant-Appellant-Cross-Appellee.

****

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC)

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7430

LOCAL 771, I.A.T.S.E., AFL-CIO,

Plaintiff-Appellee-Cross Appellant,

v.

RKO GENERAL, INC., WOR DIVISION,

Defendant-Appellant-Cross Appellee.

PETITION FOR REHEARING
(WITH SUGGESTION FOR REHEARING EN BANC)

STATEMENT

Appellee-Cross Appellant Local 771 ("Plaintiff") pursuant to Rule 40 F.R.A.P. seeks rehearing with respect to this Court's decision of March 3, 1977 and in that connection suggests that such rehearing be en banc, Rule 35 F.R.A.P. (Time to file this Petition was extended by order of Mansfield C.J. dated 22nd March 1977 on the ground of Counsel's illness.)

GROUNDS FOR REHEARING
OR CONSIDERATION EN BANC

(1) The extreme self-limitation of the scope of review of the procedural award of the arbitrator, in the light of oversight or misapprehension by the Court

of points specified below, involves a question of exceptional importance, particularly the relation between the N.L.R.B. authority when actually exercised and other dispute-resolution procedures.

NOTE: Important and illustrative in connection with this point is the Board's decision, Mid-West Radio-Television, Inc. d/b/a/ WCCO-TV, 227 N.L.R.B. No 261, discussed below, released February 4, 1977, not available to counsel until after decision herein.

(2) The decision on appealability of a non-final order should be reviewed in the light of the need to secure and maintain uniformity of the Court's decisions on this point.

(3) The attribution to a contract arbitration clause of "exclusivity" absent a covenant not to sue (or the equivalent) and in the face of conduct consistently construed to waive procedural requirements should be reconsidered.

I

THIS CASE IS AN EXAMPLE OF THE NEED TO REDEFINE THE LIMITS OF JUDICIAL ABSTENTION.

In summary, it is Plaintiff's position that (Enterprise 363 U.S. 593, 599 cited as slip op. 2172 being expressly limited to the arbitrator's "construction of the contract") the Court has authority to review and set aside an award where the application of the contract as construed, results in unjust denial of a hearing on the merits of a claim where the facts plainly show the arbitrator's

(a) Manifest disregard of the purpose of the limiting clause;

(b) Manifest disregard of the purpose of the arbitration clause;

(c) Manifest disregard of the delicate relation between administrative, arbitration and judicial tribunals with a jurisdiction that is "concurrent" only where the Board fails to exercise, or is not asked to apply its "superior" authority;

(d) Manifest disregard of elementary principles of fairness, in view of the plain persistence of factual multilaterality as flaunted by defense counsel (R.63a) who thereby demonstrated that his submission to bilateral arbitration was merely a device or trick to invoke the previously ignored 90-day clause with shrewdness supplied solely by hindsight.

The rationality of the award that the Court has said deprived plaintiff of "a decision of the merits" by the arbitrator though it "immediately .... sought multilateral arbitration by court order" should be reconsidered as to the points discussed further below, in the light of the National Labor Relations Board decision (released almost a month after this case was argued) in Midwest Radio-Television, Inc. d/b/a WCCO-TV, 227 N.L.R.B. No. 261.

In the WCCO case two factors were apparent that emphasize the necessity for reconsideration here:

(a) The Board held, citing NLRB v. Plasterers Local Union No. 79, 404 U.S. 116, that is was not barred from seizing jurisdiction by the "voluntary adjustment" of dispute clause of Section 10(k) of the Act where multilaterality exists, even

though only as the result of a dissent by a group of employees "not then formally organized." (slip op. 227 NLRB No. 261, pp. 3, 5)

This illustrates the misapprehension to be found in a key paragraph, slip op. p 2175, of this Court's panel's opinion. Despite Plaintiff's amendment to its complaint herein multilaterality of dispute persisted. So ruled by the Board in denying this Plaintiff's motion to quash the 10(k) proceeding precisely on voluntary adjustment grounds (87a-89a).

(b) The Board in WCCO noted, and gave no weight whatsoever to a bilateral arbitration award that had, prior to the Board decision, given the work assignment to the union against which the Board ruled in that case. It has never given any weight to such bilateral awards. In a footnote the Board at slip op. p 3 of 227 NLRB No. 261 showed:

> "In a state Court action brought at the time by Local 292 to confirm the arbitration award, Employer's motion to defer ruling until the Board has acted was granted, and the state Court judge ordered that Photo-News Guild be joined as a party." (Emph. Supp.)

(cf.Judge Pollack's announced refusal to proceed with the present case once the Board assumed tentative jurisdiction.)

Contrary to the implications of the panel's opinion (p. 2174) only courts and not arbitrators stay proceedings-arbitrators have no authority under bilateral contract to do so, and it is

courts, not arbitrators, that have power to add or join parties. The panel that decided this case we respectfully point out, totally overlooked:

(A) The impact of Judge Pollack's firm, if informal, stay of proceedings in the present case, R. 64a-65a, and

(B) The constant presence of a tripartite dispute, a matter of factual reality reflected by (1) the Board proceedings (R 79a-92a) (2) The Defendant's answer, R 46a Par. 13. (3) the Defendant's position at the January 12 pre-motion conference (R62a) and (4) at the Schmertz Proceedings, when, as the uncontradicted evidence shows:

> "Mr. Batterman (Defendant's new counsel) said that if the arbitrator ruled against him on time-bar, the employer would not further participate in the arbitration without first 'going to court within 48 hours' to move... for a consolidated arbitration of the present grievance with a supposed grievance concerning the Writers Guild (Aftra) contract." (63a)

In the light of the WCCO case and the foregoing, the stress placed on Local 771's amendment of its complaint, on receipt of initial disclaimer from the then competing labor organization, (but before vitiation of that disclaimer by the refusal of that organization's members to recognize it, thereby assuring

Board retention of jurisdiction) should be reconsidered.

A. Manifest Disregard of the Purpose of Time Limitation Provisions.

The sole purpose of every provision for limitation of time to sue is to protect legitimate, desirable policy objectives. These include i.e.:

1. Notice that a dispute exists, so that the adversary is not taken by surprise after having reason to believe its position has been acquiesced in, if not agreed upon,-especially when there are other relations between the parties.

2. Avoidance of prejudice attendant upon increasing (with passage of time) unavailability of witnesses or documentary evidence.

3. Adjustment of one's ongoing economic affairs, balance sheets, etc., and assumption that a matter is closed i.e., action in reliance.

The tabulation may not be exhaustive, but it is plain that there is no purpose to a limitary clause that could rationally have been served by holding the Plaintiff to have been time-barred as this arbitrator held in the circumstances of this case.

B. Manifest Disregard of the Purpose of Arbitration Clauses

As the Court's panel pointed out in its own opinion (slip op. 2172-3) one "bargained for purpose of arbitration...is the avoidance of litigation and its concomitant costs and delays".

The result reached by the arbitrator below would be most productive of litigation and its concurrent costs.

There can be no reasonable doubt that had the AAA paper writing been filed while the NLRB hearings or adjudication were impending, there would have been more litigation, more cost and inconvenience to the Plaintiff and Defendant, and above all, an added burden on the Federal Court. As we have shown above, it was not the arbitrator but the court that could have stayed bilateral proceedings-and contrary to slip op. p. 2174, Plaintiff never argued that the arbitrator could.

The extra litigation that would have ensued had the AAA filing been forced prior to the NLRB action should have been avoidable consonant with the Court's own definition of the "bargained for purpose" of arbitration.

Moreover, in an action overlooked, or whose purport was misapprehended by the panel that passed upon this appeal, Judge Pollack (well within the 90-day period) gave plain notice that he would have little patience with either party who might institute or provoke further proceedings while the NLRB was seized of jurisdiction (64a-65a).

It is one thing to say, as Defendant argued in this Court (Rep. Br. 9) that a 10(k) proceeding need not prevent a bilateral arbitration; it is quite different and manifestly in disregard of the "bargained for purpose" of avoiding litigation and costs, to say that a party must, at peril of losing its

substantive rights, attempt to force on an extra-judicial bilateral arbitration, at a time when it was perfectly plain that there would have been (a) litigious resistance, by court motion to stay and/or add parties,; (b) the displeasure, or worse, of two District Court Judges to be needlessly provoked.

As to this last point, we respectfully suggest that our claim on brief, was not as suggested at slip op. 2175, that we would have been clearly in "contempt of Judge Brieant's injunction", but that we would have been unnecessarily hazarding a contempt litigation and possible costly adverse ruling, all for no rational end. (Pl. Br. 24ff.) We argued with respect to the "peril of a contempt citation" and the "hazardous situation of a party in this area". (ie. 25.)

The factors that free federal courts to exercise at least a limited review of unjust awards are implicit in the very federal policy that ordinarily would insulate such awards from judicial interference. For if the disregard of reality (another definition if irrationality) results in a miscarraige of justice, then there is subtracted from the supposed equivalance between the no-strike clause and the arbitration clause, a principal and important element; Can it bedoubtful that awards such as that won by Defendant

employer will incite to unrest, job actions, and "wild cat" strikes?

C. Manifest Disregard of the Special Character of Concurrent Jurisdiction in Work Assignment Cases

The factors principally demonstrating this are outlined in our discussion of the WCCO case, supra, that came down after argument of this cause.

The Schmertz opinion merely makes a sidelong passing reference to "jurisdictional proceeding before the NLRB", 36a, line 6 without consideration of the time sequence of that proceeding, its subject matter or its outcome. The effect of the assumption of jurisdiction by the Board, its "superior authority" (Carey v. Westinghouse 375 U.S. 261 at 272) and the result of the NLRB's adjudication are given no consideration whatsoever. Nor was the effect of Judge Brieant's injunction, which was brought to his attention, given any thought . The contract between the parties (Art. XXI 29a) required that its provisions be evaluated as to their consistency with "Federal Law or any regulations or decisions thereunder" but no attention was paid to this requirement, the very essence of the contract.

The teaching of the Board's ruling in WCCO is a reminder that it regards bilateral arbital adjudication as of no weight whatsoever in its tripartite 10(k) decision-making process, that arbitration between two of these contending forces is a waste of litigation time and money when the NLRB process takes over, and that "a voluntary adjustment" procedure that will not

bind all parties, will not result in dismissal of a 10(k) proceeding.

The necessity for harmonious adjustment of boards, arbitrators, and courts, and avoidance of superfluous litigation in the field of Federal Law is plain. It is a manifest disregard of that necessity to make a ruling which has the mischievous effect of forcing a party on peril of loss of its rights to file a demand with the Arbitration Association when the consequences would be productive of litigation imposing on the time and energy of the Federal Court, and of no conceivable value to either party-its only purpose seemingly, to build up lawyers' fees for counsel who function on a time-charge basis.

D. Manifest Disregard of Elementary Principles of Fairness: The Persistent Multilateral Quality of the Dispute

While the Court mentions as a "bargained-for purpose" of arbitration the "avoidance of litigation:, (that of course being true in commercial cases) there is an even more significant purpose in labor cases overlooked: its function, as quid pro quo for the no-strike clause, in promoting industrial peace.

That purpose was subverted by the Schmertz award, as it would be in any case in which a court were to view too narrowly its function after a procedural-bar award, where the elementary principlesof fairness are violated by denial of a "decision on the merits" despite the taking every reasonable step to

expedite what surely had to be a multilateral adjudication procedure.

In this case every such step was taken except for a Motion for summary judgment after service of Defendant's answer (the only nonfrivolous defense of which was the claim of absence of necessary parties).

But that motion could not be made; - was not made- not because of retrospectively imputed "strategy" of Plaintiff, but because of Judge Pollack's plain declaration that he would hold proceedings in this case in abeyance pending NLRB action. (64a-65a).

The impact of Judge Pollack's action was misapprehended by the panel of the Court that wrote (slip op. 2174) that Plaintiff "freely and for strategic reasons of its own chose not to seek appropriate resolution of the 'multilateral' issue." It was manifestly disregarded by the arbitrator who blithely wrote (ignoring Judge Pollack's directive and Judge Brieant's order). "I am satisfied that the Union could have" (within 90 days of the February 21, 1975) "moved in Federal Court for an order joining other parties in that arbitration." (38a)

As we have shown above, the mere amendment of Plaintiff's complaint did not make the basic dispute bilateral. The amendment was prompted by the seeming (or pretended) refusal of the work assignment by the initially alleged third party contender (R. 42a). But a new third party contender emerged

whose identity and very existence were overlooked by the court: The insurgent group that secured independant counsel and was granted separate status as a party by the NLRB under the name of "WOR-TV Engineers", (79a, 80a, n2). Their insurgency was held by the Board to be effective to continue it with jurisdiction (89a) and it was at least their absence as a party that was alleged in Defendant's Third Affirmative Defense (47a) as to which Plaintiff was precluded from moving either to strike the defense or to add such party by the unappealable (and not so unreasonable as to require correction by mandamus) posture taken by Judge Pollack.

> "That he was not disposed to entertain applications for relief in these cases if the NLRB should assume jurisdiction nor take further action until after the NLRB relinquished jurisdiction" (65a: counsel's statement under oath and uncontradicted).

At the time, Judge Pollack's informal stay seemed quite plausible,--and it still is entirely defensible, save that its effect has been to produce unfairness and injustice in its exploitation to produce an arbitral award denying a decision on the merits, that has unaccountably been permitted to stand as a result of undue judicial abstention.

II

THIS CASE IS A DRASTIC REVERSAL OF THE TREND OF DECISION IN THIS COURT RESPECTING NON-ARBITRABILITY OF NON-FINAL ORDERS.

We incorporate here pages 5-9 inclusive of our initial brief (November 1, 1976) on the motion to dismiss the appeal. Limitations of space prevent their reproduction and elaboration here, just as, for reasons of economy, they were not textually included in the Plaintiff's brief on the merits (Pl. Br. 37). We should be glad to address the Court en banc with respect to this important issue more fully than we can now, having used most of the space alloted for this Petition on important substantive questions of Federal Law relating to the need for limits of Judicial abstention from examining arbitral awards especially in circumstances, as we have attempted to show above, that were not fully apprehended by the panel of the Court to whom the case was argued.

But the importance of the issue is stressed by the Court's own language in Weight Watchers 455 F. 2nd 770 at p. 773.

> "We have often indicated that Cohen must be kept within narrow bounds lest this exception swallow the salutary 'final judgment' rule." (and as cases cited there)

III

EXCLUSIVITY AND WAIVER

The Court's determination with respect to "exclusivity" raises serious questions which are directly related to the question of appealability as well: Without trial testimony as to the history of the negotiations, past practice, etc., as to the meaning of the agreement, should it be peremptorily construed on its face as "exclusive", the clause which may not have been so intended? Its purpose may have been only to be conditionally "mandatory" if one of the parties asserts his right to that route, After trial, depending on the construction of the agreement, the question of "waiver" discussed at length in the Plaintiff's brief would require serious consideration. (pp. 38-39)

The very purpose of the finality rule is to insure that at a trial such questions are ventilated. Judge Pollack in his opinion properly distinguished the arbitration clause in the present case from the language considered in United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593: As he pointed out in his opinion at R 133 a, the Enterprise arbitration clause contained a flat and unambiguous covenant not to institute civil suits. There is a world of difference between an agreement containing the covenant set forth in full in footnote 6, page 133a of the record, in conjunction

with a "may" clause, and a "may" clause without such covenant.

Absent the covenant not to sue, one party is competent to bring a civil action and the other by failure to exercise its right to demand arbitration to join issue and litigate in court. It can also waive the other side's failure properly to invoke the arbitration clause by its own failure to do so. Vaca v. Sipes 386 U.S. 171, 185 and other cases cited. (Pl. Br. 31-32.) The further basis for the application for the doctrine of waiver in the present case, (Pl. Br. 38-39) was not cured by the deceptive and belated action of the Defendant in pretending to submit to bilateral arbitration (contrary to predecessor counsel's implied representation to Judge Pollack on January 13 that he intended to move to "stay" R. 74a-75a, for the purpose of adding missing parties, and without reference to the 90-day clause), in a case in which it still intended to press for resolution of a trilateral controversy, and to walk out of the hearing and into court for addition of parties if forced to face the merits. (R. 63a)

CONCLUSION

It is respectfully submitted that the Court should grant rehearing and suggested that the nature of the issues is such that such rehearing may properly be en banc.

Respectfully submitted,

March 31, 1977

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3-31-77

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March 31, 1977

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Re: Local 771 v. RKO
No. 76-7430; 76-7535

Dear Mr. Clerk:

Filed herewith are 25 copies of Petition for Rehearing and Suggestion for Review en banc in this case.

This will certify that three copies have been served this day on Defendant-Appellant-Appellee's attorneys.

Respectfully yours,

Howard N. Meyer

Howard N. Meyer

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